IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 9TH FEBRUARY 2007 / 20TH MAGHA 1928

CRL.A.No. 106 of 2002()

CC.2/2001 of ENQUIRY COMMR. & SPL. JUDGE, THIRUVANANTHAPURAM

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APPELLANT: ACCUSED

S.KALADHARAN,S/O.SREENIVASAN,FORMERLY
ASSISTANT SECRETARY,KERALA STATE HOUSING BOARD,
KOLLAM DIVISION.

BY ADVS. SRI.VAKKOM N.VIJAYAN
SMT.VINITHA PRASANNAN
SMT.V.RENJU
SRI.K.S.SHERIMON
SRI.ANIYAN.P
SRI.RAGAM.K.P.
SRI.P.VIJAYA BHANU
SRI.P.M.RAFIQ

RESPONDENTS: COMPLAINANT

STATE OF KERALA,REPRESENTED BY THE
DEPUTY SUPERINTENDENT OF POLICE,VIGILANCE AND
ANTI-CORRUPTION BEREAU,KOLLAM.

BY PUBLIC PROSECUTOR SRI. S. DILEEP

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 09/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER IN CRL.M.P.NO.710 OF 2002 IN CRL. APPEAL NO.106 OF 2002.

DISMISSED

9.2.2007 Sd/-(K.THANKAPPAN, JUDGE) `

K.THANKAPPAN, J.

CRL. APPEAL NO. 106 OF 2002

Dated this the 9th day of February, 2007

JUDGMENT

The appellant is the accused in C.C.No. 2 of 2001 on the file of the Enquiry Commissioner and Special Judge, Thiruvananthapuram. He faced trial for the offences punishable under Sections 7 and 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereinafter referred to as "the P.C. Act") on the allegation that he accepted an amount of Rs.500/- as bribe from PW.1, one Muraleedharan Pillai, a physically handicapped person.

2. The prosecution case was that PW.1 had submitted an application before Kollam District Office of the State Housing Board for a housing loan and a total amount of Rs.28,000/- including subsidy was sanctioned to him. The appellant was the Assistant Secretary of the District Office of Kollam unit. It is the further case of the prosecution that an amount of Rs.19,000/- was disbursed to PW.1 in two instalments and when he filed application for the third instalment, he was informed that he was not

entitled to subsidy as the plinth area of the building was more than the area prescribed by the Board. Thereupon on 19.11.1999 PW.1 went to the office of the appellant and requested the appellant to pay the balance amount of Rs.2191/- deducting the subsidy amount and the appellant demanded a sum of Rs.500/- from PW.1 for disbursing the balance amount. According to the prosecution, since PW.1 was not prepared to pay bribe, he reported the matter to PW.5, Deputy Superintendent of Police, Vigilance, Kollam on 22.11.1999 who instructed PW.1 to come to his office on 23.11.1999 with five numbers of hundred rupee currency notes. PW.2 and DW.1 were also requested to appear before PW.5 on 23.11.1999. The amount required to be paid to the appellant was smeared with phenolphthalein powder and the tainted currency notes were entrusted to PW.1 to give to the appellant if the appellant makes a demand for the same. PW.2 also accompanied PW.1 and PW.1 was instructed to give a signal if the appellant accepts the bribe amount. It is the further case of the prosecution that as directed by PW.5, PW.1 went to the District Office of Kollam Unit, entered the cabin of the appellant and as soon as the appellant accepted the bribe, he gave signal to PW.2 who was waiting outside the cabin and PW.2 in turn relayed the message to PW.5 who on receiving the signal went to the office of the appellant along with DW.1 and other police officials and arrested the appellant after conducting

phenolphthalein test on Mo.1 series of currency notes paid by PW.1 which were recovered from the right side pocket of the pants worn by the appellant. After seizure of the material objects, crime was registered against the appellant and PW.5 continued the investigation.

3. To prove the case against the appellant, the prosecution examined PWs. 1to 6 and produced Exts.P1 to P11 and MOs.1 to 9. On the side of the defence, DWs.1 to 4 were examined and Ext.D1 was produced. On closing the prosecution evidence, the appellant was questioned under Section 313 Cr.P.C. Denying the prosecution version, the appellant filed a statement before the trial court in which he had stated that on 23.11.1999 while he was in the office with DW.2 discussing about a meeting to be conducted at the District Panchayat level, PW.1 entered his cabin and asked him about the loan and when he told him that the cheque was ready and the same can be accepted, PW.1 pushed something into his pocket and immediately thereafter PW.5, DW.1 and other officials came to his cabin and removed the bundle of notes which were thrust into his pocket by PW.1. The appellant further stated that the case was foisted against him at the instigation of one M.L.A. due to personal enmity . However, relying on the evidence adduced by the prosecution, the trial court found the appellant guilty under Sections 7 and 13(2) read with Section 13(1)(d) of

the P.C. Act, convicted him thereunder and sentenced him to undergo rigorous imprisonment for a period of four years and to pay a fine of Rs.25,000/- for the offence punishable under Section 7 of the P.C. Act and in default of payment of fine, to undergo rigorous imprisonment for a further period of one year. He was further sentenced to undergo rigorous imprisonment for a period of four years for the offence under Section 13 (2) read with Section 13(1)(d) of the P.C.Act. The substantive sentences were ordered to run concurrently. The above conviction and sentences are challenged in this appeal.

4. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

5. Learned counsel appearing for the appellant had raised three contentions before this Court: (i) the trial court went wrong in placing reliance on the evidence of PWs.1 and 2 with regard to payment and acceptance of bribe as alleged by the prosecution as there was no corroborative evidence to show that the appellant had demanded bribe at any time, (ii) the trial court committed error in accepting the evidence of PW.2 that he could see what was happening inside the cabin because of the day light and position of the cabin in which the appellant was sitting

during the relevant time as Ext.P4 mahazar and Ext.P10 site plan would show that PW.2 could never have seen what was going on inside the cabin in which event the case put forward by the appellant is more probable and (iii) the trial court had not considered the case of the appellant set up by him while he was questioned under Section 313 Cr.P.C. which would show that his case is more probable and if that be so, the alleged recovery made by PW.5 itself is not enough to find the appellant guilty of the offences alleged against him. The learned Public Prosecutor, on the other hand, submits that the trial court correctly appreciated the evidence of PWs.1, 2 and 5 to find the appellant guilty of the offences alleged against him and that the case set up by the appellant under Section 313 Cr.P.C. is not consistent with the case suggested to him.

6. PW.1 was the applicant for housing loan. He deposed before the court below that including subsidy an amount of Rs.28,000/- was sanctioned to him out of which an amount of Rs.19,000/- was disbursed to him in two instalments. He further stated that when he went to the office of the appellant on 19.11.1999 for the third instalment, the appellant informed him that he was not entitled to subsidy as the plinth area of the building, on measurement, was found to be more than the area prescribed by the Board. This witness further stated that when he requested the

appellant to pay him the balance amount deducting the subsidy amount, the appellant demanded Rs.500/- and that since he was not willing to give bribe, he filed a complaint before PW.5 on 22.11.1999. PW.1 further deposed that PW.5 instructed him to come to the office on 23.11.1999 with five numbers of hundred rupee currency notes and that when he came on 23.11.1999, he was introduced to PW.2 and DW.1. He deposed that PW.5 then smeared phenolphthalein powder on the currency notes brought by him and advised him to go to the office of the appellant along with PW.2 and hand over the currency notes to the appellant on demand and go give signal to PW.2 as soon as the appellant accepts the money. Further, this witness stated that he went to the office of the appellant along with PW.2, he entered the cabin of the appellant while PW.2 waited outside the cabin. According to PW.1, the appellant who was alone in the cabin asked him whether he had brought the money as agreed and PW.1 handed over to him the currency notes smeared with phenolphthalein powder which the appellant accepted. PW.1 further stated that as soon as the appellant accepted the money, he gave a signal to PW.2 as directed and PW.2 in turn gave signal to PW.5 who was waiting outside the building and that as soon as he got the signal, PW.5 entered the cabin of the appellant along with DW.1and other police officials and recovered Mo.1 series and Mo.7 series of hundred rupee currency notes from the pocket of the appellant

and on conducting phenolphthalein test on Mo.1 series, it was found that the said currency notes were the same currency notes given by PW.1. The hands of the appellant also had turned pink when dipped in lime water.

7. PW.2 who was working in the office of the Animal Husbandry, Kollam during the relevant time deposed that on 23.11.1999 at the request of PW.5, he had accompanied PW.1 to the office of the appellant and waited outside the cabin of the appellant while PW.1 went inside the cabin to enquire about the loan. This witness deposed that PW.1 went inside the cabin, the appellant and PW.1 talked something and then PW.1 gave the money to the appellant. He further stated that as soon as the appellant accepted the money, PW.1 gave him the signal whereupon he gave the signal to PW.5 who went inside the cabin and arrested the appellant after recovering the currency notes from the pocket of the pants worn by the appellant. The evidence of this witness was supported by PW.5 who stated that he had applied phenolphthalein powder on the currency notes brought by PW.1 and had instructed PW.1 to hand over the said currency notes to the appellant on demand. PW.5 further stated that he, DW.1 and other police officials waited outside the building and entered the cabin as soon as he got the signal from PW.2 who was waiting outside the cabin of the appellant on instructions. This witness further stated that he recovered

two bundles of hundred rupee currency notes from the pocket of the pants worn by the appellant and the first bundle when tested with lime water turned pink . He further stated that he prepared Ext.P4 mahazar and got Ext.P10 site plan prepared by PW.4 and that the final charge was laid by PW.6.

8. The question to be considered in this case is whether in the light of the contentions raised by the learned counsel for the appellant, the evidence adduced by PWs.1, 2 and 5 are sufficient to find the appellant guilty of the charge levelled against him.

9. The trial court relied on the evidence of PW.1 to prove that the appellant had demanded a sum of Rs.500/- from PW.1 as bribe for disbursing the third instalment of the loan already sanctioned to him. It has come out in evidence that PW.5 had specifically instructed PW.1 to pay the amount to the appellant only if he makes a demand for the same. The evidence of PW.1 is that the appellant had asked him whether he had brought the amount as agreed. When PW.2 was examined in this aspect, he stated that he had seen the appellant and PW.1 talking in the cabin of the appellant, but he was not in a position to state whether the appellant had demanded the money. Hence, the trial court is left with the only

evidence of PW.1. The prosecution case itself is that an amount of Rs.28,000/- was sanctioned to PW.1 out of which an amount of Rs.19,000/- was already disbursed to him. In the above circumstances, the evidence of PW.1 that the appellant had demanded Rs.500/- on 19.11.1999 has to be viewed very cautiously as there is no evidence to corroborate the version of PW.1. PW.2 had no case that he heard the appellant demanding bribe on 23.11.1999. In this context, learned counsel appearing for the appellant invited the attention of this Court to Ext.P2 series. As per Ext.P2 (d), it is seen that two cheques were already issued to PW.1 on different dates and the paper used was one which is for the use of the Law Officer whereas in Ext.P4(f) it is recorded that a cheque has been received by PW.1 on 23.11.1999. Ext.P4(f) is a paper noted as check sheet. If the amount was received on 23.11.1999 as spoken to by the prosecution, it should have been recorded in Ext.P2(d) itself or in the same manner as recorded in Ext.P2(d). Hence, Ext.P2(f) will not prove that the third instalment was paid to PW.1 on 23.11.1999 only on payment of the bribe. That apart, from the evidence of PW.5 it can be seen that Ext.P2 records were taken into custody by him on 23.11.1999. So, the entry made in Ext.P2(f) has no relevance.

10. The trial court accepted the evidence of PW.2 that he could see

what was happening inside the cabin of the appellant. The trial court found that the cabin of the appellant had transparent glass shutters and hence PW.2 could see what was happening inside the cabin. In this context, learned counsel for the appellant invited the attention of this Court to Exts.P4 mahazar and Ext.P10 site plan. In Ext.P4 mahazar, it is stated that the cabin of the appellant was on the second floor of the building in the northern extremity and that the eastern and southern sides of the cabin were closed with sun mica and aluminium fabrication. The entire length and width of the cabin are also described in Ext.P4. It is also stated in Ext.P4 that the door to the cabin is 1.95 x 1.10 m. with an auto closer and the top portion of the door is covered with plain glass measuring about 90 cm. Ext.P10 site plan also shows the layout of the cabin of the appellant. It is recorded in Ext.P10 that the appellant had his cabin on the northern extremity of the second floor and there was a revolving chair placed somewhere in the middle of the cabin. The finding of the trial court was that the glass fitted in the cabin of the appellant being transparent, PW.2 could see what was happening in the cabin. It is to be noted that the top portion of the door is covered with plain glass measuring about 90 cm. That being so, the evidence of PW.2 has to be appreciated in the above background. PW.2 had stated that he had seen what had taken place in the cabin. To a specific question as to where PW.2 was standing when PW.1

went into the cabin of the appellant, he had answered that he was standing on the eastern side of the cabin. That means PW.2 could not see what was taking place in the cabin. The only way through which he can see the persons inside the cabin is through the glass fitted on the door which is on the southern side of the cabin. That being so, the evidence of PW.2 that he had seen PW.1 giving the amount to the appellant is not free from doubt. The case set up by the appellant in this regard was that when PW.1 entered his cabin, he was having a discussion with DW.2 regarding the meeting to be held at the District Panchayat level. He had a further case that he was standing and attending the phone when PW.1 asked him about the loan and that when he told PW.1 that the cheque was ready, PW.1 thrust something in the right side pocket of his pants whereupon he caught hold of the hand of PW.1 and immediately thereafter PW.5, DW.1 and other police officials rushed to the cabin and PW.5 asked him to take out the amount given by PW.1. The appellant had a further case that he had another bundle of notes amounting to Rs.500/- with him. It was possible for the appellant to thrust something in the pocket of the appellant while he was standing and attending the phone. Further, it is seen from the evidence of PW.1 that the appellant was standing when he entered the cabin. In the above circumstances, the case set up by the appellant cannot be rejected as such.

11. The next point to be considered is regarding the action of PW.5. Though he recovered MO.1 series and MO.7 series of hundred rupee currency notes from the pocket of the pants worn by the appellant, phenolphthalein test was conducted only on Mo.1 series of hundred rupee currency notes. If the appellant had put the currency notes in his pocket as alleged by the prosecution, MO.7 series of currency notes also would have got smeared with phenolphthalein powder. PW.5 was silent as to why MO.7 series of currency notes were not subjected to phenolphthalein test. However, this witness admitted that if MO.7 series of currency notes happened to come into contact with MO.1 series of currency notes, then MO.7 series of currency notes if subjected to phenolphthalein test would have given positive result. That apart, DW.1 who had entered the cabin of the appellant along with PW.5 had removed prasadam and a key from the pocket of the pants worn by the appellant, but those material objects were also not subjected to phenolphthalein test.

12. This Court has already found that 90% of the loan amount was disbursed to PW.1 without demanding any bribe and it appears that such demand was made only when PW.1 requested for the third instalment of Rs.2191/- which also creates some doubt. In the light of the infirmities in

the evidence of PWs.1, 2 and 5 and in view of the case set up by the appellant, learned counsel for the appellant submits that the mere recovery of MO.1 series of currency notes by PW.5 from the pocket of the pants worn by the appellant alone is not sufficient to find the appellant guilty of the offences alleged against him. To substantiate this point, learned counsel for the appellant invited the attention of this Court to the decisions of the Apex Court reported in **Suraj Mal v. State (Delhi Administration) (1979) 4 S.C.C. 725**, **Meena v. State of Maharashtra (2000) 5 S.C.C. 21** and **Subash Parbat Sonvane v. State of Gujarat, A.I.R. 2003 S.C. 2169**. In the decision reported in **Suraj Mal v. State (Delhi Administration) (1979) 4 S.C.C. 725**, the Apex Court considered the fact situation in which the prosecution relied on the recovery of the bribe money from the accused and held that **"mere recovery by itself cannot prove the charge of the prosecution against the appellant in the absence of any evidence to prove payment of bribe or to show that the appellant voluntarily accepted the money". In Meena v. State of Maharashtra (2000) 5 S.C.C. 21**, the Apex Court had taken the view that recovery of currency notes found lying on the pad of the table cannot be considered as amount received as bribe. The same view was followed in the decision reported in **Subash Parbat Sonvane v. State of Gujarat, A.I.R. 2003 S.C. 2169** wherein the Apex Court held that the presumption

under Section 20 of the P.C. Act on the basis of the recovery made from the accused is not available with regard to an offence punishable under Section 13(1)(d) of the P.C. Act.

13. In the light of the discussion made above, this Court is of the view that the prosecution failed to prove the case against the appellant beyond reasonable doubt and hence, the appellant is entitled to the benefit of doubt. In the above circumstances, the conviction and sentences awarded against the appellant are set aside and his bail bonds shall stand cancelled.

The Crl. Appeal is accordingly allowed.

(K.THANKAPPAN, JUDGE)

sp/

K.THANKAPPAN, J.

CRL.A. NO.106/2002

JUDGMENT

9TH FEBRUARY, 2007.